

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

CLERK'S OFFICE U.S. DIST. COURT
AT LYNCHBURG, VA
FILED

DEC 13 2006

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NICHOLAS E. PITTARELLI,
Petitioner,

Civil Action No. 7:06-cv-00705

v.

MEMORANDUM OPINION

UNITED STATES OF AMERICA,
Respondent.

By: Hon. Norman K. Moon
United States District Judge

The petitioner, Nicholas E. Pittarelli, filed this action as a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255 on November 27, 2006. The petitioner challenges the revocation of his supervised release. The petitioner alleges that the United States violated his due process rights by failing to provide certain exculpatory evidence, and that his attorney provided ineffective assistance. Upon review of the motion and the records in the petitioner's criminal case, the court concludes that the motion must be dismissed without prejudice, because the petitioner's direct appeal is still pending.

Background

On January 28, 2000, the petitioner was convicted of wire fraud in the United States District Court for the Northern District of New York. He was sentenced to a term of imprisonment of twenty-one months, followed by a three-year term of supervised release.

On September 19, 2003, the petitioner was found in violation of his conditions of supervised release. As a result of the violation, the petitioner was sentenced to a term of imprisonment of six months, followed by a twenty-seven-month term of supervised release.

Pursuant to 18 U.S.C. § 3605, the Northern District of New York transferred jurisdiction over the petitioner to the Western District of Virginia on April 29, 2004. On May 19, 2004, this court accepted jurisdiction over the petitioner.

On April 24, 2006, the petitioner was found in violation of his conditions of supervised release.

The court sentenced him to a term of imprisonment of nine months. The petitioner filed a notice of appeal on May 4, 2006. Court records and the instant motion indicate that the petitioner's appeal is still pending before the United States Court of Appeals for the Fourth Circuit.

Discussion

It is well established that, absent extraordinary circumstances, a federal district court should not consider a § 2255 motion while a petitioner's direct appeal is still pending. See Bowen v. Johnson, 306 U.S. 19, 26-27 (1939); United States v. Cook, 997 F.2d 1312, 1319 (10th Cir. 1993); United States v. Gordon, 634 F.2d 638, 638-39 (1st Cir. 1980); Welsh v. United States, 404 F.2d 333 (5th Cir. 1968); United States v. Davis, 604 F.2d 474, 484 (7th Cir. 1979); United States v. Taylor, 648 F.2d 565, 572 (9th Cir. 1981); United States v. Khoury, 901 F.2d 975, 976 (11th Cir. 1990); Womack v. United States, 395 F.2d 630, 631 (D.C. Cir. 1968); United States v. Tanner, 43 Fed. Appx. 724, 725 (4th Cir. 2002) (unpublished). In this case, the petitioner's motion fails to present extraordinary circumstances warranting noncompliance with this general rule. Consequently, the petitioner's motion is premature and must be dismissed without prejudice.

The Clerk is directed to send certified copies of this memorandum opinion and the accompanying order to the petitioner and counsel of record for the respondent.

ENTER: This 13th day of December, 2006.


United States District Judge